IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Nos. 2 and 3

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees*.

ORGANIZED VILLAGE OF KAKE, and ANGOON COMMUNITY ASSOCIATION, *Appellants*,

v.

WILLIAM A. EGAN, Governor of Alaska, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR APPELLEES

RALPH E. MOODY
Attorney General of Alaska

AVRUM M. GROSS
Assistant Attorney General

Counsel for Appellees
Room 430, Capitol Building
P. O. Box 2170
Juneau, Alaska

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

CITATIONS

Cases:

Page

TREATIES, STATUTES AND REGULATIONS:

Page

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Nos. 2 and 3

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant,*

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees.*

ORGANIZED VILLAGE OF KAKE, and ANGOON COMMUNITY ASSOCIATION, *Appellants,*

v.

WILLIAM A. EGAN, Governor of Alaska, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the Supreme Court of Alaska is reported at 362 P. 2d 901 (1961). A copy of the opinion is contained in the separate Appendix filed with the Statement as to Jurisdiction, Nos. 2 and 3, O.T.

1961, by appellants herein. (Citations to the opinion ("Op.") refer to pages in the Appendix.)

The opinion of the District Court for the District of Alaska, from which appeal was initially taken to this Court, is reported at 174 F. Supp. 500 (R. 59-66).

The opinion earlier entered by this Court is reported at 363 U.S. 555 (1960). The opinion of Mr. Justice Brennan, granting appellants a stay of execution pending the outcome of their appeals, is reported at 4 L. Ed. 2d 34, 80 S. Ct. 30 (1959).

JURISDICTION

Probable jurisdiction was noted by this Court on October 23, 1961. Jurisdiction rests on 28 U.S.C., Sec. 1257(1), (2).

QUESTIONS PRESENTED

1. Does Ch. 17, SLA 1959 as amended, forbidding the use of fish traps, apply to appellants Kake and Angoon?

A. Does Sec. 4 of the Alaska Statehood Act, by which the State disclaimed control over native "property (including fishing rights)" deprive the State of authority to regulate appellants' method of fishing?

B. In the absence of express disclaimer of state jurisdiction in the Statehood Act, do state fisheries regulations apply to Kake and Angoon as well as to other Alaskan areas?

2. Does Ch. 17, SLA 1959 as amended, forbidding the use of fish traps, apply to appellant Metlakatla?

A. Do the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. Sec. 358, the Presidential Proclamation No.

1332, 39 Stat. 1777, as ratified by the Act of May 7, 1944, 48 Stat. 667, and Sec. 4 of the Alaska Statehood Act, all of which set aside and preserved a temporary area for the exclusive fishing use of the Metlakatlans, deprive the State of control over the methods of fishing within that area?

B. In the absence of express deprivation of state jurisdiction through this series of official acts, do state fisheries regulations apply to Metlakatla as well as to other Alaskan areas?

STATUTES INVOLVED

The statutes, Presidential Proclamation, regulations, involved are lengthy, and are set forth in Appendix A of this brief. Included therein are the pertinent portions of:

1. Alaska Statehood Act, Sec. 1, 72 Stat. 339.

2. Alaska Statehood Act, Sec. 4, 72 Stat. 339.

3. Alaska Statehood Act, Sec. 6(e), 72 Stat. 340-341.

4. Alaska Omnibus Act, Sec. 2, 73 Stat. 141.

5. White Act, Sec. 1, 43 Stat. 464, amended 44 Stat. 752, 48 U.S.C., sec. 221 et seq.

6. Treaty of Cession, Art. VI, 15 Stat. 539.

7. Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777.

8. Act of May 7, 1934, Sec. 3(c), 48 Stat. 667.

9. Session Laws of Alaska 1959, Ch. 17, Sec. 1, as amended by Session Laws of Alaska 1959, Ch. 95.

10. Session Laws of Alaska 1959, Ch. 95, Sec. 1.

11. C.F.R., Tit. 25, Ch. 1(H), Part 88.2 (Supp. 1961).

STATEMENT OF THE CASE

Since time immemorial, Alaska has been blessed with a natural food resource in the form of annual migrations of salmon. Responding to instinct, the fish seasonably form in huge schools in the salt water, enroute to the mouths of the fresh water rivers and streams they will soon enter. At a time dictated primarily by instinct, the schools commence a mass movement from the sea toward the mouths of the rivers and streams. It is at this time of migration that the commercial fishing for salmon occurs. The annual harvest may well be said to be the bulwark of the entire Alaskan economy. ROGERS, ALASKA IN TRANSITION, p. 94 (1960).

During Alaska's territorial status, exclusive regulatory control over the commercial fisheries was exercised by the Federal Government. Regulations specifying legal means of fishing as well as permissible areas of fishery were promulgated by appropriate federal agencies acting under congressional authorization. Under the statutory framework of regulation, all fishermen in Alaska were treated as equals. While Alaska's commercial fishing population was composed of nearly one-half native fishermen,[1] they were never subject to different regulations or distinguished in any way from their fellow citizens.

During the years of federal regulation, the fish trap came into existence and use. A trap consists, first of all, of a wire or webbed fence, stretched from the shore

---

[1] The 1950 census indicates that a total of 3,121 Alaskans are employed in the fishing industry. Of that total, 1,317 are nonwhites. U.S. Bureau of the Census, United States Census of Population: 1950, Vol. II, Part 51.

to the seaward and from the ocean bottom upward to a point above the high water mark. Located at the seaward end of the fence is an opening into the heart or pot. The trap operates in conjunction with the recognized fact that salmon parallel the shoreline in traveling toward their spawning streams on an incoming tide. Fish traveling in such a manner are temporarily halted by the webbing stretched from the trap to the shoreline. As a result, the fish turn seaward in an attempt to avoid the obstruction, eventually being diverted into the heart or pot, where they remain until removed.

The effect of traps upon the fishery can be devastating,[2] and it is not surprising that public opposition to them appeared quickly in Alaska when the steady depletion of the resource became evident. Denied the power to regulate the fisheries, Alaskans took the only course open to them. From 1913 to statehood, Alaskans pleaded with federal authorities to regulate or abolish traps.[3] Opposition was not restricted to white fishermen. Native fishermen, who comprised nearly half of the total fishing population, suffered equally from the

---

[2] The tremendous effect that even one trap can have upon the fishery was noted by this Court in *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78 (1918).

[3] Opposition took the form of memorials to Congress from the Territorial Legislature, e.g. SLA 1931, 275; SLA 1947, 325-6; SLA 1953, 401-2; SLA 1955, 447-8.

depletion of salmon and strove equally hard for the abolition of this particular means of fishing.[4]

In 1956. the Alaskan people adopted a constitution in hope of imminent statehood. In conjunction with that constitution, the people similarly adopted Ordinance #3, which was to become effective on the same date as the constitution. That ordinance read:

> "As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of

---

[4] It is significant that as recently as November, 1959, when the only traps operating in Alaska were native traps, the Alaska Native Brotherhood reiterated its stand for complete abolition of traps. The resolution adopted by that group is as follows:

"Convention at Yakutat, November 9-14, 1959.

RESOLUTION No. 64-36, INTRODUCED BY KLAWOCK, CAMP #9

ENTITLED: Abolition of all Fish Traps

Whereas, the native people of Alaska, through their officially recognized organization, have consistently opposed the use of fish traps in Alaskan waters, and

Whereas, their opposition to these fish traps is in no way contrary to the State Constitution of Alaska,

THEREFORE BE IT RESOLVED that this convention of the Alaska Native Brotherhood and the Alaska Native Sisterhood reiterate our stand for complete abolition of traps, and that a copy of this resolution be directed to the Governor of Alaska.

/s/ A.E. WIDMARK
Grand President, A.N.B.

Attest

/s/ C.E. PECK
Grand Secretary, A.N.B."

The prominence of the ANB as native spokesman is discussed in COHEN, FEDERAL INDIAN LAW, p. 963 (revised by Dept. of Interior 1958); also see GRUENING, STATE OF ALASKA, 397-8 (1959).

> salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State."

Ordinance No. 3 was adopted by a vote of 21,285 to 4,004 (Op. 9).

On January 7, 1958, in response to Alaskan desires, Congress passed the Statehood Act, providing for the subsequent admission of Alaska to the Union. 72 Stat. 339 (1958), amended by 73 Stat. 141 (1959). Section 6(e) of that Act provided for the termination of federal control over the regulation of Alaskan fish and wildlife. Federal authority was to terminate upon the state's establishing certain required regulatory machinery of its own. No provision was made in Sec. 6 for any continuation of federal management.

However, Section 4 of the Statehood Act did exempt from state control certain native fishing rights in conjunction with a general reservation to the Federal Government of control over ". . . property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said natives; . . ." It is over the scope of the disclaimer in Sec. 4 that this legal controversy has arisen.

On January 3 of 1959, Alaska was admitted to the Union. Shortly thereafter, the Alaska Legislature adopted legislation to implement Ordinance #3, banning the use of fish traps for use in commercial fishing. Chapter 17, SLA 1959, as amended by Ch. 95, SLA 1959. No exception was made in the statutory prohibi-

tion for natives or native communities which, until statehood, were always subject to general fisheries regulation.

Following the enactment of Ch. 17, SLA 1959, the Secretary of the Interior issued regulations banning the use of fish traps in the State. The Secretary's action was predicated on the theory that the State had not yet established its system of fish and game management and therefore, under Sec. 6(e) of the Statehood Act, he was required to manage Alaska's fisheries. In addition, the Secretary felt that his position was that of trustee-administrator for state laws, thereby requiring him to adopt regulations similar to state desires. The Secretary's action and views were upheld. *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660 (D.C. Cir. 1959).

However, in issuing the regulatory ban, the Secretary refused to adopt the complete prohibition prescribed by state statute. Under the theory that Sec. 4 of the Statehood Act placed all native fishing of any nature exclusively under federal control and made state laws inapplicable to native fishermen, he exempted certain fish traps owned by natives from the general prohibition (S.R. 85, 104-5, 131-2). In particular, traps at Kake, Angoon and Metlakatla, three Alaskan villages, were authorized. 24 Fed. Reg. 2053.[5]

On April 17, 1959, the State adopted a comprehensive fish and game regulatory code in compliance with the Statehood Act, and subsequently assumed full manage-

[5] In 1960 the Secretary again adopted regulations authorizing appellants' traps with one modification. While the original regulations only granted permission to operate traps for the 1959 fishing season, the present regulations grant the privilege for an indefinite duration. C.F.R., Tit. 25, Ch. 1(II), Part 88.2 (Supp. 1961).

ment authority over the fisheries resource. On June 17, 1959, after prior warning to the Secretary that the State would enforce its laws equally on all citizens, state officers arrested several persons and seized one trap on which pre-season work was being performed.

Actions for restraining orders were immediately commenced by appellants in the District Court for the District of Alaska. On motion by the appellees, all complaints were dismissed (R. 59-66), 174 F. Supp. 500 (1959). Appeal was taken directly to this Court, due to the fact that the present Alaska Supreme Court had not yet been organized. (R. 79.) Pending the final outcome of the appeals, a stay was issued by Mr. Justice Brennan on July 11, 1960. 4 L. Ed. 2d 34 (1960).

On June 20, 1960, this Court noted jurisdiction but reserved decision on the merits. 363 U.S. 555 (1960). The cases were remanded to the newly created Supreme Court of Alaska with directions to determine first whether the state legislation in issue was meant to apply to the appellants, and second, whether the exercise of the state police power was justified.

The Supreme Court of Alaska, after full argument, unanimously affirmed the District Court's decision. After first construing Ch. 17, SLA 1959 as amended as fully applicable to appellants as well as other state citizens, the court upheld the statute's validity by ruling that Sec. 4 of the Statehood Act did not deprive the State of regulatory control over native fishing. As fish traps possessed no special status their abolition was held to be within the scope of state power. Appeal has again been made to this Court.

The appellants in this controversy are three primarily native communities in Southeastern Alaska.

None of them claim any aboriginal or historical use of fish traps. The Metlakatlans immigrated from Canada in 1887, and have used fish traps since 1914. *Alaska Pacific Fisheries* v. *U. S.*, 248 U.S. 78 (1918). Kake and Angoon commenced using fish traps in 1950 and 1948 respectively (R. 83, 102). The fish traps used by appellants have been used only at such times as the same have been authorized by the Secretary of the Interior under general fishing regulations applicable to the whole of Alaska, promulgated pursuant to the authority of the White Act and similar fisheries legislation, "for the purpose of protecting and conserving the fisheries." Sec. 1, 43 Stat. 464, 48 U.S.C., Secs. 221-224. Pursuant to Sec. 1 of the White Act, all Alaskans—Indians, whites, and half bloods—partaking in the commercial fishery have received common treatment and no special privilege to use traps have ever been granted to appellants as communities or to their inhabitants as individuals.

The one difference between appellants Kake and Angoon and appellant Metlakatla lies in the fact that in 1916 the Government set aside for the Metlakatlans a water area within which they alone could fish. In all other respects the communities are similar.

SUMMARY OF ARGUMENT

The rights and duties of appellants in this case are essentially dependent on a question of statutory interpretation. If Alaska was admitted to the Union under an enactment which retained control of the fishing activities of appellants to the Federal Government, their conduct is free from state interference. If, on the other hand, no such exception was made, the State has full regulatory control over them as it does over the rest of its citizens.

The only exception to state authority over native fishing is provided in Sec. 4 of the Statehood Act. That section provides that Alaska forever disclaims all right and title to "property (including fishing rights)" held by natives, or held by the Government in trust for them. The extent of the disclaimer is limited by two requirements. First, the claim must be in the nature of a native "right," or at least a type of claim which may be parenthetically included within the term "property." Second, and equally important, the "right" must have been "held" at the date of passage of the Statehood Act. All parties agree that Congress, in adopting Sec. 4, merely meant to maintain the status quo, and not to *create* new rights.

Prior to statehood, all fishing in Alaska was conducted under regulations adopted by the Department of the Interior. Under those regulations, areas where fishing could be undertaken, the times when fishing was permissible, and the types of equipment that could be used in particular areas were specified. The use of fish traps or any other kind of equipment under this comprehensive regulatory scheme created no "rights" of any kind in the operator. The Government was free to terminate the use of traps by a change in the regulations. Similarly, the use of a site for trap fishing gave no "rights" against subsequent appropriation of that site by another trap operator. Without any previously established right to use a trap, appellants cannot claim that their trap operation is exempted from state control by Sec. 4.

Appellees do not mean to infer that there are no native fishing rights in Alaska. There are such rights, established by Congress, and their nature will be subsequently discussed. None of them are in issue here.

Past federal regulations governing the use of fish traps possessed no special status in the over-all regulatory program. Therefore, appellants' contention that their use of fish traps was a "right" as defined in Sec. 4 implies of necessity an interpretation of Sec. 4 that deprives the State of *all* regulatory control over native fishing. This interpretation is completely inconsistent with past congressional policy, which has been both to treat all fishermen in common, and to hasten the complete integration of the native peoples into the general society. The interpretation is similarly inconsistent with the rest of the Statehood Act, which provides for the complete termination of federal control over the Alaskan fishery and transfer of all properties previously necessary for management to the State. Finally, the very impact of such an interpretation indicates its fallacy. Natives comprise nearly one-half of Alaska's fishing population. If one sovereign is to completely regulate half of the fishermen, while another regulates the other half, it may well follow that neither sovereign can perform an adequate regulatory function. The efforts of one may be cancelled out by the efforts of the other, to the detriment of the entire population, native and non-native.

Therefore, the disclaimer in Sec. 4 cannot by any standards be interpreted to mean that control of all native fishing is in the hands of federal authorities. Section 4 only has application to certain congressionally created native fishing rights, none of which are in issue here.

Nor does the fact that Metlakatla was established within the confines of an exclusive fisheries reserve forbid the State from imposing reasonable conservation measures in regulating the fisheries within that

reservation. Regulation of this nature is not inconsistent with the purpose for which the reserve was created. Prior to statehood, the Metlakatlans were granted an exclusive fisheries reservation, but they were not given any rights to take fish by means forbidden to other Alaskan citizens. Congressional policy has never sought to free Metlakatlans from general fisheries regulation, but only to forbid trespassers in the water area. The Metlakatlans may have possessed a right to fish exclusively in an area, but that right alone was preserved under the Statehood Act.

Since regulatory control over native fishermen and fisheries was not reserved in the Statehood Act, it passed to the State as a natural concomitant of its admission to the Union on an equal footing with other states. The State, therefore, has full authority to regulate appellants' fishing activity, and in particular to forbid their use of traps.

ARGUMENT

I. KAKE AND ANGOON ARE SUBJECT TO STATE LAW FORBIDDING FISH TRAPS

A. SECTION 4 OF THE ALASKA STATEHOOD ACT DOES NOT BAR APPLICATION OF STATE LAW PROHIBITING THE OPERATION OF FISH TRAPS TO KAKE AND ANGOON

Introduction

The express disclaimer which is the crux of this litigation is found in Sec. 4 of the Alaska Statehood Act. That section provides in part:

> "As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to . . . any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said na-

> tives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority . . ." 72 Stat. 339 (1958), amended by 73 Stat. 141 (1959).

Appellants contend that the disclaimer over property (including fishing rights) in Sec. 4 deprives the State of Alaska of authority to restrict the operation of their fish traps. In actuality, the nature of appellants' claim goes far beyond the validity of this particular state restriction. While this controversy centers about state regulation of a particular means of commercial fishing, there is nothing unique about the means involved. The regulation or abolition of fish traps is but one phase of an over-all fisheries management program which regulates all means of fishing, in addition to setting the times and areas where fishing is permissible. If appellants are free to use traps, they are similarly free to use any form of fishing equipment, to fish at any place, and at any time, entirely free of state control. Indeed, Kake and Angoon frankly admit that their urged interpretation of Sec. 4 would deprive the state of regulatory control over all native fishing of any kind (KABR 11). The United States apparently supports this broad interpretation (USBR 12).

Appellants' interpretation of necessity equates the disclaimer over native fishing *rights* with a hypothetical disclaimer over native *fishing* in general. The interpretive equation is both unwarranted and erroneous. First, it distorts the clear language and accepted mean-

ing of the words in Sec. 4; second, it disregards nearly 100 years of congressional policy toward Alaskan natives; third, it is inconsistent with the rest of the Statehood Act; and fourth, such an interpretation would have an effect so absurd as to demonstrate its invalidity.

(1) Kake and Angoon had no "fishing rights" as were disclaimed by the State of Alaska in Sec. 4 of the Statehood Act

In ascertaining the scope of the disclaimer of state jurisdiction prescribed by Sec. 4, several points are immediately obvious. First, the State only disclaimed as to rights "held" by or for natives at the date of the Act. No new rights were to be created.[6] Second, only fishing "*rights*" were disclaimed by the State. Section 4, by its terms at least, does not provide a state disclaimer over all native "fishing." Finally, the over-all disclaimer is over native "property." Fishing rights are only parenthetically included.

Native property rights, including fishing rights, have a well defined judicial meaning. Unless subsequently it appears that Congress intended to deviate from those established definitions, the scope of the disclaimer should be measured by them.

---

[6] That Congress sought to maintain the *status quo* is evidenced not only by committee reports on the actual Statehood Act, but by reports on similar language contained in previous statehood acts which failed of passage. E.g. H.R. Rep. No. 88, 84th Cong., 1st Sess., 47; H.R. Rep. No. 624, 85th Cong., 1st Sess. 19; S. Rep. No. 1929, 81st Cong., 2d Sess. 1, 2, 11 (1950); H.R. 331, 81st Cong., 2d Sess. (1949); H.R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949). Indeed, the appellants agree that Congress fully intended to maintain the status quo (MEBR 30) (USBR 20-21). The controversy has arisen in determining what Congress thought the status quo to be at the time of statehood.

Indian rights in property may be categorized in two groups. First, there is "recognized" Indian right or title. The recognition spoken of in this context is that of the Federal Government, which through treaty or act of Congress creates certain rights in Indians. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277-8 (1951). A recognized right is not only protected against interference by third parties, but upon a subsequent taking by the Government gives rise to a compensable claim. *United States* v. *Creek Nation*, 295 U.S. 103 (1935).

The second classification of Indian rights is "unrecognized" right or title. This classification may in turn be subdivided. First, Indians may possess aboriginal rights, gained from continuous and exclusive exercise of the right from time immemorial, *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). Second, the Government may create for Indians certain temporary rights subject to subsequent modification or abolition. *Aleut Community of St. Paul Island* v. *United States* (Ct. Cl. 1954), 177 F. Supp. 427; *Ute Indians* v. *United States*, 330 U.S. 169 (1947).

The basic distinction between recognized and unrecognized rights lies exclusively in the parties against whom the right is enforceable. Recognized title is enforceable against the Government and third parties. Unrecognized title is only valid against third parties.

If Kake and Angoon are to succeed in their contention that they possessed "rights" at the date of the Statehood Act which were disclaimed by the State of Alaska, it is incumbent upon them to specify the nature of those rights. Appellees will concede that so far as they are concerned, as third parties it is insignificant

whether the right was recognized or unrecognized. However, it must be one or the other if it is to be classified as a right at all.

Appellants have made no claims that they possess any recognized rights of property or fishing in Alaska (KABR 24). The absence of treaty or congressional act establishing such rights precludes their existence. Any rights claimed by appellants, then, must take the form of unrecognized rights. Appellants must show that they have gained and preserved an aboriginal claim, or that the Government has acted to create rights in them protected against third parties.

The present existence of any aboriginal rights in Alaskan natives was expressly repudiated in *Miller* v. *United States*, 159 F. 2d 997, 1001-2 (9th Cir. 1947); overruled on other grounds, *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1951). The Court relied on Article VI of the Treaty of Cession, 15 Stat. 539, by which all dominion over Alaska was passed from Russia to the United States "free and unencumbered by any . . . possessions . . . except merely private individual property holders; . . ." Since aboriginal title is clearly tribal and not private in nature (*Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307 (1902)), the Court concluded:

> "It seems quite clear, therefore, that whatever 'possession' the Tlingit Indians had 'from time immemorial prior to' the year 1867 was a tribal and not an individual right, and did not come within the classification of the excepted 'private individual property' specified in the Russian treaty. Consequently, the Tlingits' 'original Indian title' to the tidelands in question was extinguished by that state paper." Id. at 1002.

Even assuming contrary to the *Miller* case that aboriginal fishing rights did survive the Treaty of Cession, it is clear that these rights were subsequently destroyed. With the exceptions of the Metlakatla and Karluk fishery reserves, Congress has declared all waters in Alaska open to a public fishery. Since 1924, the fishery was managed under the White Act, which specifically forbade the granting or protection of exclusive or several rights in Alaskan waters. Section 1, 43 Stat. 464, 48 U.S.C., Secs. 221-224. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949). It is difficult to see how Congress could have repudiated the continued existence of aboriginal fishing rights in a more definite manner. Aboriginal rights, by their very nature, are exclusive rights. *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 326 (1941). By an express negation of exclusive rights, therefore, Congress terminated their existence. It is indisputable that Congress was fully empowered to abrogate any such aboriginal rights. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1951).

The ethical considerations inherent in such a taking need not be considered here. Suffice to say that the natives are not without recourse. Under a special jurisdictional act, the Court of Claims has recently granted these very natives a right of compensation for the taking of their aboriginal rights.[7] *Tlingit and Haida Indians* v. *United States*, 177 F. Supp. 452 (1959). The court specifically noted that:

---

[7] Appellants claim that the *Tlingit and Haida* case held that aboriginal fishing rights "exist" (KABR 29, n. 25). This claim confuses the present with the past. The Court held that while aboriginal rights had *existed*, they had been extinguished by subsequent government action. Indeed, this was the very grounds on which a compensable right was granted.

"The most valuable asset *lost* to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all others . . ." (Emphasis supplied.) Id. at 468.

The area considered in the Court of Claims proceedings encompasses the area in which these fish traps are now operating. It would indeed be anomalous if the same natives who have been granted a right to compensation for a taking of their historical rights would be permitted to predicate their present claim on the continued existence of those rights.

It is equally impossible to find any congressional or executive action which established unrecognized rights in these natives. Kake and Angoon have always fished under the commercial fisheries regulations applicable to all of Alaska. They have never been distinguished from other Alaskan fishermen. The traps they have used have been authorized under regulations which permitted any person to use traps within the particular area.[8] Therefore, if appellants received any

---

[8] For example, in 1958 the traps used by Kake and Angoon were operated under the following regulation of the Department of the Interior (C.F.R., Tit. 50, Ch. 1, (f) (1958)):

"Sec. 115.27. *Areas open to traps.* The use of any traps for the capture of salmon is prohibited, except as follows:—

• • • • • • •

"(b) *Western District.*

• • • • • • •

"(4) Chichagof Island: East coast . . . (iii) from 57°36'37" N. lat. to 57°35'52" N. lat., . . .

• • • • • • •

"(11) Admiralty Island: West coast from 57°22'07" N. lat. to Distant Point.

• • • • • • •

"(13) Admiralty Island: West coast . . . (iii) within 1,000

unrecognized rights, those rights of necessity must have been created from the mere fact that appellants were permitted to fish on the same basis with other fishermen.

The creation of a protected right from completely equal treatment is at best difficult to comprehend. But it is not necessary to deal in abstractions. Federal courts in Alaska have previously had opportunity to consider whether the mere act of fishing, and contextually, the operation of fish traps under general fisheries regulation created any sort of rights in the operator.[9]

---

feet of 57°13′57″ N. lat.

• • • • • •

"(c) *Eastern district* . . .

• • • • • • •

"(4) From the south side of Fanshaw Bay at 133°32′27″ W. long. to Cape Fanshaw thence southeasterly to 133°29′57″ W. long.

"(5) Admiralty Island: Southeast coast (i) from Point Pybus to 57°18′57″ N. lat.; and (ii) from 57°20′07″ N. lat., 133°54′58″ W. long. to False Point Pybus.

• • • • • • •

"(9) (i) From a point ½ statute mile southeast of Point Macartney to Point Macartney; (ii) within 2,500 feet of 57°03′23″ N. lat., 134°01′51″ N. lat., 133°56′13″ W. long.

"(10) Within ¼ statute mile of Cornwallis Point.

The traps operated by Kake and Angoon were within the above designated areas. Any person, community, or association was equally free to operate traps therein.

[9] The relevance of local law on the question of whether "rights" exist is indicated by the decision of this Court in *Damon* v. *Territory of Hawaii*, 194 U.S. 154 (1904); *Boquillas Land and Cattle Co.* v. *J. N. Curtis*, 213 U.S. 346 (1909). These decisions are applicable when the Act which speaks of "rights" is adopted by the same sovereign who previously determined the existence of "rights." Here, the Federal Government occupies both positions.

The answer has been unequivocally negative. No individual or community had a "right" to operate a fish trap—even one enforceable against third parties. *Thlinget Packing Co.* v. *Harris and Co.*, 5 Alaska 477 (D. Alas., 1st Div., 1916); *Columbia Salmon Co.* v. *Berg*, 5 Alaska 538 at 546 (D. Alas., 3d Div., 1916); *Fischer* v. *Everett*, 11 Alaska 1, 66 F. Supp. 540 at 542 (D. Alas., 3d Div., 1945); *Canoe Pass Packing Co.* v. *United States* (9th Cir., 1921), 270 F. 533. Neither previous use nor large investment was sufficient to create such a right. *General Fish* v. *Markley*, 13 Alaska 700, 105 F. Supp. 968 (D. Alas., 3d Div., 1952). Fish traps were treated in law as entirely similar to all other fishing equipment. The individual who first started operating the device had a priority purely because of his physical location, much as only one net can fish in a specified area of water at one time.

In conjunction with the fact that native rights *were not* created by participation in the fishery under general regulatory authority, this Court has previously held that such rights *could not* have been created. In *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1948), the Court struck down an attempt by the Secretary of the Interior to utilize his general regulatory authority over Alaska's fisheries in creating an exclusive native fishery. The Court held that the intent of Congress, as clearly expressed in the White Act, was to forbid creation of exclusive rights or privileges in any group, regardless of whether they were natives or not. Id. at 120-123.

Therefore, prior to statehood, appellants Kake and Angoon had neither recognized nor unrecognized fishing rights. Their use of traps could be freely abolished by the Government. It could similarly be validly in-

fringed upon by third parties, competing on an entirely equal basis in the general fishery. They possessed no "fishing rights" whatsoever, and in particular, no rights to operate fish traps or any other form of fishing gear.

A reference to certain legitimate native fishing rights created under federal control, may tend, by comparison, to clarify the prior discussion. While Alaskans in general have been forbidden to take fur seals, certain natives have been permitted to take them for subsistence. Act of February 26, 1944, 58 Stat. 100, 16 U.S.C., Sec. 631(c); and see *Aleut Community of St. Paul Island* v. *United States* (Ct. Cl. 1954), 177 F. Supp. 427. This is not a *recognized* right in that it may be terminated by the Government at any time, but it clearly is a right in that it can be validly protected against third parties. The seal fishery[10] is not the only place where native rights have been created. By executive order, the natives of Karluk have been provided with an exclusive fisheries reserve. Public Land Order 128, issued pursuant to Executive Order 9146, April 24, (1942), 1 C.F.R., Cum. Supp. 1149. While the withdrawal by executive order probably did not create a compensable interest in the natives upon subsequent abolition of the reserve, it did create a right of occupancy protected against third parties. While Metlakatla's rights will subsequently be discussed in detail, it is significant for the present to note that an exclusive fishing area was temporarily reserved to them—first by executive order, and subsequently by Congress itself. Presidential Proc. #1332, 39 Stat. 1777; Act of May 7, 1934, 48 Stat. 677. The withdrawal, by its specific

[10] Seal "fishery" is the accepted terminology. COHEN, FEDERAL INDIAN LAW, 944-945 (revised ed. 1958).

temporary terms, probably did not create a recognized right, but unquestionably did create a right of exclusive use as against other fishermen. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918). In addition to these federally created rights, it is possible that certain natives in the Interior of Alaska, who have taken salmon for *subsistence* since time immemorial, still retain their aboriginal rights to do so."

These rights are noted purely for the purpose of indicating that Congress, in using the phrase "fishing rights," was not speaking loosely. There are such rights in Alaska, and these rights are protected from state interference. But it is *only* those rights which are protected.

There is additional evidence of the fact that in speaking of native fishing rights Congress specifically had in mind recognized and unrecognized rights, rather than some new concept of "right." Section 4, after first reserving control over native "fishing rights" to the Federal Government, states:

> "... *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to

[11] The natives on the Yukon and Kuskokwim Rivers have historically gained their sustenance by fishing, using small hand traps and fish wheels. Chapter 17, SLA 1959, as amended, specifically exclud small hand driven traps from the general fish trap ban.

any such claim shall be unaffected by anything in this Act: . . ."

This provision is clearly couched in the terminology of recognized and unrecognized rights. Congress did not wish, by reserving control over unrecognized rights as well as recognized ones, to imply that those unrecognized rights thereby became recognized. But most important, the provision indicates that Congress was specifically aware of the legal nature of the rights they were dealing with. When the terminology "fishing rights" was used, it was with full knowledge of the fact that those words had well defined meanings. Indeed, the Government in its argument makes specific note of the fact that the nature of Indian "rights," recognized and unrecognized, was fully explained to Congress in hearings on the Statehood Act. (USBR 18, 19.)

Congress, then, in Sec. 4 preserved all fishing rights of natives. But in doing so, they did not enlarge traditional legal concepts of native rights. Parties for whom rights were never created or protected cannot claim an exemption from state regulation under a section that was obviously intended only to apply to specific rights. Since Kake and Angoon cannot claim fishing rights of any nature—recognized or unrecognized—their fishing activities are not exempt from state regulation under Sec. 4.

(2) Appellants' interpretation of Sec. 4 is inconsistent with past congressional policy toward Alaskan Indians

Congressional action touching on Indian affairs should clearly be interpreted within the framework of past congressional policy toward that Indian group. *United States* v. *Chavez*, 290 U.S. 375 (1933). Radical

departures from that standard are not favored. It is therefore highly relevant to examine congressional policy toward Alaskan natives prior to statehood. For if congressional policy has clearly been to treat natives or an entirely equal basis with whites, it would be a distorted inference to claim that a continuation of that policy in actuality meant the formation of an entirely new approach of separation and special treatment. Cf. *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 603-4 (1943).

The early history of federal policy toward Alaskan natives differed enormously from the policy toward Indians in the lower states. With vast areas of land and few occupants, there was no danger of hostilities which accompanied the expansion westward. No treaties were ever entered into with Indian groups, though the treaty power was still available at the time of Alaska's purchase.[12] No reservations were set aside for their exclusive use. Initially, at least, the natives were left to make their own amalgamation into the white society as best they could without federal aid.

Integration came quickly. As early as 1886 one federal court, in commenting on the status of the Indian groups, noted:

> "What, then, is the legal *status* of Alaska Indians? Many of them have connected themselves with the mission churches, manifest a great interest in the education of their youth, and have adopted civilized habits of life. Their condition has been gradually changing until the attributes of their original sovereignty have been lost . . ."

---

[12] Alaska was purchased on June 20, 1867. The power to enter into treaties with Indian tribes was effectively terminated by the Act of March 3, 1871, 16 Stat. 544, 546.

In re Sah Quah, 31 Fed. 327 (D. Alaska 1886) at 328.

The same judge recognized another fact which is unique to Alaskan natives. Unlike their counterparts in other states, the natives' social organization was not tribal. There was no such organization as would permit them to exercise independence from, or supremacy to, generally applicable laws. Id. at 329.

These two factors are dominant in Alaska native history. First, the tribal status, if indeed it ever existed, exists no more.[13] Second, amalgamation into the civilized community proceeded at an amazing pace, considering the fact that initially no federal aid was

---

[13] That Congress was fully aware of the absence of tribal type affiliation in many areas of Alaska is borne out by the terms of the Wheeler-Howard Act, which, when it was extended to Alaska, provided:

> "Sec. 473(a). Same; application to Alaska
>
> Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska; *Provided*, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well defined neighborhood, community, or rural district may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title." Act of May 1, 1936, Ch. 254, Sec. 1, 49 Stat. 1250, 25 U.S.C. Sec. 473(a).

Compare this phraseology with Sec. 476, 25 U.S.C. applying to other American Indians:

> "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws. . . ."

Also see *Tlingit and Haida Indians* v. *United States*, 177 F. Supp. 452 at 463 (1959).

granted to ease the transition from one civilization to another.

The first real federal interest in Alaska's native population was indicated in 1905, when an ethnologist was delegated to investigate the status of Alaskan natives. The subsequent report divided natives into two groups for the purpose of future federal policy toward them. The first classification is of interest here. It was composed of native peoples who were, to a large extent, self-sustaining, had nearly completely amalgamated into the white society, and needed only supplementary federal programs to aid them further. That self-sustaining group was composed of the Tlingits, the Haidas, and the Tsimshians, all of whom are appellants here. *Condition and Needs of the Natives of Alaska*, 58 Cong., 3d Sess., Sen. Doc. 106.

In recognition of this continuing process of amalgamation, Congress sought to aid rather than detract from it. With two extremely limited exceptions no native reservations were ever established in Alaska. Whatever their value in other states, reservations in Alaska were condemned as racial segregation and discrimination in its worst form. *United States* v. *Libby, McNeill & Libby*, 14 Alaska 37, 107 F. Supp. 697 (D. Alas. 1952). Congress did not exclude Indians from territorial taxation. Crimes committed by Indians in Alaska have always been punished by territorial and state courts, and criminal law is applicable to all Indians wherever situated and regardless of the nature of the offense.[14] *United States* v. *Booth*, 17 Alaska

[14] *Petition of McCord*, 17 Alaska 162, 151 F. Supp. 132 (D. Alas., 1957) represents an exception to this general statement. The case is unique in this area of Alaska law, and is distinguished in *United States* v. *Booth*, 17 Alaska 561, 161 F. Supp. 269 (D. Alas., 1958).

561, 161 F. Supp. 269 (D. Alas., 1958). The Territory, and now the State, have traditionally afforded equal educational opportunities to white and native alike. Indeed, the educational facilities for the three appellants in this action are state facilities. Federal authorities have not only sanctioned this practice, but advocated the complete transfer of all federal educational facilities to state control.[15] The vote was granted to Alaska with no differentiation as to whites and natives. Act of August 24, 1912, Ch. 887, Sec. 5, 37 Stat. 513, referring to Act of May 7, 1906, Ch. 2083, Sec. 3, 34 Stat. 170. The natives have not only exercised their voting privileges but have held many high elective offices. Of the 60 members of the First State Legislature, nine were natives. The president of the Senate, William Beltz, was an Eskimo. Senator Frank Peratrovich, of Tlingit ancestry, succeeded Senator Beltz. Senator Peratrovich, incidentally, was elected from an election district composed 78.3% of whites. ROGERS, ALASKA IN TRANSITION, 55 (1960).

But the clearest indication of congressional policy was found in federal management of the commercial fisheries. In Alaska's greatest industry Congress refused to segregate or distinguish fishermen on the basis of race. The White Act, under which Alaska's commercial fisheries were managed, specifically directed that regulation was to be generally applicable, and could not be utilized for the benefit of one racial group or another. *Hynes* v. *Grimes Packing Co.*, 337 U.S.

---

[15] In 1951, the Area Director of the Alaska Native Service officially stated: "Plans are being completed whereby all ANS schools will be transferred to Territorial responsibility in an orderly manner and on a yearly basis by 1960." *Annual Report of the Governor of Alaska*, 80 (Fiscal Year 1952).

86 at 120-123. Where natives were dependent upon fisheries for *sustenance*, Congress made exceptions. But in the vast areas of Alaska, where commercial rather than subsistence fishing occurred, all were treated equally.

The over-all policy of Congress was eminently successful. In the words of one federal judge:

> "... [T]he Indians of Southeastern Alaska, and particularly the Haidas, have not only abandoned their primitive ways and adopted the ways of civilized life, but are now fully capable of competing with the whites in every field of endeavor. It is a matter of common knowledge that today the Indians of Southeastern Alaska prefer the white man's life despite all its evils and shortcomings . . ." *United States* v. *Libby, McNeill & Libby*, 14 Alaska 37, 107 F. Supp. 697 at 699 (D. Alas., 1952).

Appellants now take the position that in passing the Statehood Act, Congress sought to ignore nearly 100 years of consistent policy toward establishing common treatment of both races. It seems illogical to claim that after consistently treating all Alaskans equally in regard to fishing as well as other phases of life, Congress suddenly desired to reverse itself—to segregate Alaskans on the basis of race—to grant to Alaska control over white fishermen, but not over native.

The claim is particularly illogical in light of the fact that in spite of a general equality of treatment, Congress did previously establish certain specific native rights of fishery, the nature of which have been previously discussed. In such cases a continuation of congressional policy would imply a continual protection. But these are specific rights—not general con-

trol. A limited interpretation of Sec. 4 has the merit of only continuing those distinctions that Congress previously sanctioned, and of not creating new artificial distinctions, based purely on race, that Congress never previously sanctioned, and indeed, specifically avoided.

(3) Appellants' interpretation would create an inconsistency within the Statehood Act itself

Section 6(e) of the Statehood Act is a clear indication of the congressional desire to dispose of the management of the entire fishery to the new state.[16] That section primarily provides for the termination of federal authority over the management of the fish and game resources of the State upon the State's establishing its own system. No exception is made for federal retention of authority over native fishing. Certainly if, as appellants urge, Congress desired to re-

---

[16] The relevant portion of that section reads:

"(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest . . ."

tain control over such a substantial portion of the total fishery, it would have specified that desire in the very section which provides for termination of the function. Indeed, if a major segment of Alaska's fisheries was to be alienated from public control, it became incumbent on Congress to so specify in the clearest of language. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 at 105 (1949). That language is conspicuously absent.

Equally important is the fact that Sec. 6(e) provides that all property previously used by the Federal Government in the conservation and protection of the fish and wildlife of Alaska was to be turned over to the new state. No exceptions were made for property used in the regulation and control of a native fishery. It is hardly reasonable to believe that Congress sought to retain in the Government the authority to regulate nearly one-half of Alaska's fishermen, and at the same time required the Government to dispose of all properties necessary to that work.

A limited interpretation of Sec. 4, as suggested by the appellees, is entirely consistent with the broad termination of federal authority over management in Sec. 6(e). For the special rights preserved in Sec. 4 do not entail a federal management of the fisheries. While Metlakatla will be subsequently discussed, it is important for the sake of example to at least touch on its "rights" presently. Metlakatla had reserved to it under the Statehood Act an area in which only Metlakatlans were permitted to fish. In retaining jurisdiction over that right, the Government's activity will be that of insuring that the area remains exclusive—not of regulation. In the case of aboriginal rights (though none exist here), the Government's

function, by the very nature of aboriginal rights, will be that of insuring that those rights are not interfered with by third parties. These functions do not involve a comprehensive management and conservation program, such as would be necessary were the control of all native fishing reserved, in the Federal Government.

To read Sec. 4, then, as a broad grant of r gulatory authority over Indian fishing to the Federal Government is inconsistent with other portions of the Statehood Act itself. It follows that Congress did not intend to retain such broad authority, but instead intended to retain control over certain specified rights—none of which are in issue here.

(4) Appellants' urged interpretation of Sec. 4 would nullify any attempt to adequately conserve Alaska's fisheries

As a last indication of the proper interpretation of Sec. 4, it is important to consider the effect of the interpretation claimed by appellants. While it is not a function of this Court to pass on the wisdom of an Act of Congress, it is at least reasonable to assume in interpreting a congressional act that Congress did not intend an absurd result. *Helvering* v. *New York Trust Co., Trustee,* 292 U.S. 455, 464-5 (1934); *Ozawa* v. *United States,* 260 U.S. 178, 194 (1922).

If appellants' contentions are correct, there is a dual sovereignty over fishing in Alaska. The State has full regulatory power over its white citizens, while the Federal Government has full regulatory authority over natives, each to the exclusion of the other. The difficulty with this dual sovereignty is that both natives and whites fish in the same water, at the same time. No one in Alaska is restricted to a particular area for fishing.

The effect of such a dual sovereignty may be clearly seen by hypothesizing a typical regulatory situation. One of the primary functions of salmon conservation is to insure that a required number of fish escape the commercial gear and enter the streams to spawn, insuring the continuation of the resource. To insure this fact, the State imposes closed fishing periods during the runs—periods in which salmon are unobstructed in their attempts to reach their spawning beds. It is obvious that unless all fishermen are bound by such a closure, the conservation attempt will fail. If half the fishermen can fish, it will simply mean that they take twice the fish that they would if other fishermen were not barred—salmon will still be unable to reach the streams. The result of such a halfway measure is that the conservation system becomes completely ineffective. The resource becomes depleted because it cannot be adequately managed.

This is exactly the result that appellants' suggested interpretation implies. If native fishermen are to be free of state regulation, it means that one-half of the State's fishermen are not bound to respect state regulations. The State will be helpless to protect itself from a depletion of its own resource.

This Court has previously had occasion to consider a similar situation of dual sovereignty over fisheries. In *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556 (1916), it was proposed that the interpretation of a treaty with the Seneca Indians be that the state would regulate fishing by the whites and the tribe would regulate its members fishing under treaty right on the same land. The Court stated:

> "... It is said that the state would regulate the whites and that the Indian tribe would regulate

> its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both."

It was held that the tribe was subject to state regulation.

Should this Court adopt the limited interpretation of Sec. 4 suggested by the appellees, Alaska's control of its natural resource is secure. While certain native fishing rights are reserved from state control, they are at least not of the type which would conflict with the state's management duties. Generally, Alaska will be free to regulate its resource for the benefit of all its people.

B. IN THE ABSENCE OF EXPRESS RESERVATION IN THE STATEHOOD ACT, ALASKA FISHERIES REGULATIONS APPLY TO KAKE AND ANGOON AS WELL AS OTHER ALASKANS

Assuming that appellees' construction of Sec. 4 of the Statehood Act is valid, and the regulation of all native fishing was not reserved to the Federal Government, the only question remaining is that of whether through its admission to the Union, Alaska itself gained the power of regulation. There can be little doubt that it did.

It is firmly established that the regulation of fish and game resources is an essential attribute of state power. *Geer* v. *Conn.*, 161 U.S. 519 (1896); *Lawton* v. *Steele*, 152 U.S. 133 (1894). The power extends to all citizens of the State, Indian or white, in the absence of valid federal action forbidding such jurisdiction. *Ward* v. *Race Horse*, 163 U.S. 504 (1895); *United States* v. *Brooks*, (N.D. Ind. 1940), 32 F. Supp. 422 at

427. Indeed, even if the Federal Government acts to set aside certain fishing rights for Indians, through treaty or congressional act, the State is still free to regulate the exercise of those rights so long as the regulation is not inconsistent with the exercise of the right itself. *Tulee* v. *State of Washington*, 315 U.S. 681 (1942); *United States* v. *Winans*, 198 U.S. 371 (1905).

That such broad powers over fisheries management are similarly held by Alaska subsequent to admission is a natural concomitant of the equal footing doctrine. That doctrine prescribes that upon admission to the Union, each state assumes equal sovereign powers with the states which have preceded it. *Pollard* v. *Hagan*, 44 U.S. (3 How.) 212, 228-9 (1845). While the doctrine is judicial in nature, it is significant that Congress specifically affirmed Alaska's admission "on an equal footing" in Sec. 1 of the Statehood Act.[17] There can be no question, then, that Alaska entered the Union with full sovereign powers, including that of fisheries regulation.

The appellees recognize that the equal footing doctrine is not without certain limitations. In particular, Congress may restrict the scope of state jurisdiction in an act admitting the state to the Union, so long as the restriction is otherwise within the constitutional powers of the Federal Government. *Coyle* v. *Smith*, 221 U.S. 559 (1911). The restriction's validity does

---

[17] "[Sec. 1. **Declaration; acceptance, ratification and confirmation of Constitution**] Subject to the provisions of this Act, . . . the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal **footing with the other States in all respects whatever** . . ." Act of July 7, 1958, 72 Stat. 339.

not depend on the act of admission itself, but solely because the power of Congress extends to the subject.

To narrow the issues in controversy, the appellees will assume for purpose of argument that Congress could have, if it desired, withdrawn regulation of all native fishing from state control without violating the equal footing doctrine. An inequality would have been produced in that no other state has had its regulatory authority so drastically withheld, but it would not be the sort of legal inequality contemplated by the equal footing doctrine.

However, regardless of what Congress *could* have done, it did not retain general regulatory authority over natives fishing anywhere in the State. The effect of Sec. 4 has already been noted—its interpretation is narrow, and does not remove general regulatory authority from the State. Nowhere else in the Statehood Act is any reservation of any federal control whatsoever over natives specified. The conclusion follows that the terms of the Statehood Act do not withhold the regulation of native fishermen from the State. Indeed, the congressional affirmation in Sec. 1 that Alaska was to be admitted to the Union on an equal footing with the rest of the states indicates that the effect of the Act was to expressly confer that jurisdictional authority on the State.

This Court has held that in the absence of specific reservation of past federal or tribal control, full regulatory power over Indian fishing passes to the State upon admission. In *Ward* v. *Race Horse*, 163 U.S. 504 (1895), the Act admitting Wyoming to the Union had made no mention of a previous treaty right held by the Bannock tribes to take game "upon the unoccupied lands of the United States." The Act did state that

Wyoming was to be admitted to the Union "on an equal footing with the original States in all respects whatsoever." 26 Stat. 222 (1890). The absence of an express savings clause, together with the equal footing provision, was held to abrogate the treaty rights. To imply a continuation of those rights, the Court noted, would be to disregard the presumption that Congress intended to admit the State with full governmental authority.

The application and theory of *Race Horse* is of striking clarity here. First, like *Race Horse*, the Alaska Statehood Act did not reserve general regulatory authority over Indian fishing to the Federal Government—only specified regulatory authority over rights which are not in issue here. Second, like the Wyoming Act of Admission, there is an express congressional affirmation that the State of Alaska is to be admitted on an equal footing with other states, if indeed such an express statement was necessary.

The rationale of *Race Horse* becomes even stronger when it is recognized that unlike that case, which involved the preservation or abolition of a solemn treaty right, this case involves no previously created rights whatsoever.

It is not necessary to consider here whether subsequent to the admission of Alaska as a state, Congress could once again assume jurisdiction over native fishing which it had delegated to the State. The question is academic. Congress has taken no action since the adoption of the Statehood Act which could in any way be interpreted to mean that they desired to regulate native fishermen in Alaska. Indeed, the Secretary of the Interior, who is responsible for the regu-

lations authorizing these traps, predicated his action on the White Act, as amended by Sec. 4 of the Statehood Act—not on any subsequent expression of congressional policy (S.R. 85, 104-5, 131-2). If the appellees' interpretation of the Statehood Act is correct, it is quite apparent that the White Act no longer has any application to the general management of Alaska's commercial fisheries and the Secretary's regulations are without legal foundation.

Kake and Angoon, and their occupants, are full Alaskan citizens. As such, they are fully subject to state conservation laws—laws on which not only their, but all Alaska's future depends. In an effort to cease further depletion of the salmon runs, the State has imposed a ban on fish traps. Kake and Angoon cannot be permitted to enrich themselves at the expense of their fellow citizens. Their particular interests must yield before the paramount interest of the State as a whole.

II. THE STATE OF ALASKA HAS FULL JURISDICTION OVER COMMERCIAL FISHING IN THE METLAKATLA RESERVE

Introduction

Most of the previous argument has full application to Metlakatla as well as Kake and Angoon. However, there are certain distinctions between Metlakatla and the other appellants which necessitate separate treatment.

The Metlakatla situation varies from that of Kake and Angoon in several respects. First, it does not involve a federal claim to total jurisdiction over all natives fishing anywhere in Alaska. Rather, the concern is with a particular and unique fisheries reserve

set up by the Government prior to statehood, and the effect of state law upon fishing in that reservation. Metlakatla freely concedes that state fisheries regulations are fully applicable to Metlakatlans while fishing outside the confines of the reserve (MEBR 12). Second, the situation differs in that, unlike Kake and Angoon, the exclusive right to fish within the Metlakatlan fisheries reserve can reasonably be termed a "native fishing right" within the meaning of Sec. 4 of the Statehood Act.

But this admission merely forms the question—it does not decide it. For the real issue is the nature of the right preserved to the Metlakatlans by Sec. 4 of the Statehood Act. The appellees contend that the right preserved went only to the *area* of reservation, and in no way involved the manner or means of fishery.

A. SECTION 4 OF THE ALASKA STATEHOOD ACT DOES NOT BAR APPLICATION OF STATE LAW PROHIBITING THE OPERATION OF FISH TRAPS TO METLAKATLA

It is clearly within the power of the Federal Government to create Indian reservations within a state or territory which will be free of all local regulatory authority. *Worcester* v. *Georgia*, 6 Pet. 515; *Williams* v. *Lee*, 358 U.S. 217 (1959). Furthermore, the Government is free to continue the existence of any such reservation past the time of a state's admission without violating the equal footing doctrine. If Metlakatla is such a reservation, it has a free right to use fish traps, or for that matter any other form of fishing gear free of state regulation.

However, the Federal Government has never been bound to create the same type of reservations for all Indian peoples. The Government is free to create reservations under any terms it deems proper. *Mis-*

souri, Kansas and Texas R'y. Co. v. *Roberts*, 152 U.S. 114 (1894) (granting rights of way across tribal land); *Buttz* v. *The Northern Pacific Railroad Co.*, 119 U.S. 55 (1886) (same); Op. Sol. I.D.M. 14237, Dec. 23, 1924 (granting states power to tax); COHEN, HANDBOOK OF FEDERAL INDIAN LAW, pp. 95-96 (1945). It may grant state jurisdiction over Indians or it may refuse to grant it. E.g. 62 Stat. 1224, 64 Stat. 845, 25 U.S.C., Secs. 232, 233 (1952) (granting civil and criminal jurisdiction to N. Y.); 68 Stat. 795, 18 U.S.C., Sec. 1162 (Supp. 1957) (granting criminal jurisdiction over reservations to certain states). An investigation of Metlakatla's rights, therefore, must proceed initially from a determination of what rights were created by the Federal Government prior to statehood, through creation of the Metlakatla reserve.

The Metlakatlans were originally a branch of the Tsimshian Indian tribe of British Columbia. Some 800 of these Indians emigrated from British Columbia to Annette Island in Southeastern Alaska in 1886 and established the community of Metlakatla. *Alaska Pacific Fisheries* v. *United States*, 4 Alas. Fed. 709, 711, 248 U.S. 78 at 86 (1918). In 1891, Congress enacted legislation which set aside the body of lands known as the Annette Islands as a reservation for the use of Metlakatlans and such other Alaskan natives as might care to join them. 26 Stat. 1101, 48 U.S.C.A., Sec. 358 (1952). On April 28, 1916, President Wilson issued a proclamation declaring the waters within 3,000 feet of the shore at mean low tide of Annette and adjacent small islands as a reservation for the Metlakatlans and such other Alaska natives as had or might join them, "... *to be used under general fisheries laws and regulations* ..." (Emphasis supplied.) Presi-

dential Proc. No. 1332, April 28, 1916, 39 Stat. 1777. The validity of the exclusive nature of the reservation was upheld by this court. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918). Congress, in 1934, affirmed the reservation *under the terms that it then existed*, subject to future modification. Act of May 7, 1934, Ch. 221, Secs. 1-2, 48 Stat. 667 (now covered by 8 U.S.C.A., Sec. 1401 (1952)).

This series of enactments creates the total substance of Metlakatla's rights. The Metlakatlans were granted an area in which they alone could fish. But the right was limited by the specific federal directive that all fishing done within the area was to be under general fisheries regulation.

It is not surprising that the Metlakatlan reservation, unlike the vast majority of federal Indian reservations, was fully subject to the uniform scheme of fisheries regulation. First, the fishery in which the Metlakatlans engage is commercial. Where a subsistence fishery is preserved by creation of a reservation, the needs of the population provide a natural limitation on the use of the resource, and no governmental control is necessary. But where commercial fisheries are concerned, the natural desire of people to make as much money as possible often precludes a self-imposed conservation policy, and artificial controls are necessary. Second, if Metlakatlans were allowed to fish on their reservation without regard to conservation they would not only be hurting themselves, but substantial numbers of fishermen outside of the reservation. The salmon taken in Metlakatla's reserve are, for the most part, not Metlakatlan salmon. They are salmon spawned in streams outside the reserve, protected by money from state funds paid by all

citizens, who now seek to return to their original streams to spawn. In doing so, they pass through the Metlakatlan reserve.

In realization of these facts, it is entirely realistic that the Federal Government insisted that the exclusive fishing reserve be only exclusive as to trespass, and not free of general fisheries regulation. For a conservation program to succeed, all must be equally bound or the entire program may fail. *Missouri* v. *Holland*, 252 U.S. 416 (1920).

During the entire history of the reserve's existence, the fishing within it, while undertaken exclusively by Metlakatlans, has been under the same regulatory scheme as the entire fishery. No exceptions have been made. The Metlakatlans had no greater rights to fish in unique manner, and in particular to use traps, than did other Alaskans.

Assuming then that Sec. 4 of the Statehood Act did operate to divest the State of control over any fishing *right* possessed by the Metlakatlans, what did that divestiture entail? Since the only right possessed by the Metlakatlans was that of forbidding other fishermen to enter their reserve, it appears that Sec. 4 preserved that right. The State, therefore, is not free to authorize entry into the reservation. But the State, like the Federal Government before it, does have the right to prescribe the *means* by which fish may be taken within the reservation. The Metlakatlans possessed no right prior to statehood to be free of regulation, and they cannot claim to have had a non-existent right preserved.

While this Court has never been presented with a situation completely similar to this, it has had occasion

to pass on certain analogous situations. When a right of fishery has been reserved to Indians at a specified place, the Court has uniformly held that in the absence of specific federal protection, the right was subject to valid state regulation. In *Tulee* v. *Washington*, 315 U.S. 681 (1942) the Court considered the effect of a treaty provision reserving to Indians the right to take fish "at all usual and accustomed places in common with the citizens" of Washington. The Court held that the treaty left with the state "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing . . ." Similarly, in *United States* v. *Winans*, 198 U.S. 371, the Court recognized the right of the state to validly regulate those treaty rights which had not, by federal action, been excluded from their control. In *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556 (1916), in considering a fishing right granted by treaty, it was held:

> ". . . [T]he clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised. . . ." Id. at 563-4.

It is true that all of the above cited cases dealt with Indians fishing outside of the confines of a reservation. But the location itself is not crucial *unless the Federal Government makes it so.* In the case of Metlakatla, Congress only granted to Metlakatla the right to exclusive use of their area. The Government never granted to the Metlakatlans a freedom from regula-

tion. The extent of Metlakatla's right, then, is similar to a treaty right which grants Indians the right to take fish in a particular place ("at all accustomed places" is the usual terminology). But this analogous right is subject to state regulation, and so is that of Metlakatla.

The nature of the Metlakatlan "reservation" cannot be too strongly emphasized. It is not, and has never been treated as what is normally termed an Indian reservation. Residents of the Annette Island Community are a mixed group composed of descendants of the Tsimshian Indians, Aleuts and Eskimos. There is no tribal organization. Residents are trained technicians to a large extent—many servicing the airport, which is one of the most important in Southeastern Alaska (Op. 60). The fisheries fleet is not restricted to taking salmon in the "reserve" but extends to all Southeast Alaskan waters, and other fisheries than salmon (Op. 60). Schools within the area are furnished by the State (Op. 60). The residents have always paid state income taxes, school taxes, gasoline taxes, and generally all forms of state taxes paid by other residents of Alaska (App. B). Prosecution for crimes is handled in all respects as though there was no reservation. *United States* v. *Booth,* 17 Alaska 561, 161 F. Supp. 269 (D. Alas., 1958). When the area has been economically depressed, state funds have been allocated to it as they have to other communities similarly situated. (App. C.)

The Alaska Supreme Court in full recognition of the complete fusion of Metlakatla into the Alaskan community as a whole, held that the reservation did not survive the admission of Alaska into the Union. It is not necessary to draw such a forceful conclusion.

It is only necessary to fully recognize the status of the "reservation" before statehood and apply relevant legal theory—not theories which may be applicable to Indian reservations elsewhere, set up under different terms, and given different historical treatment. It was the Federal Government's prerogative to set up the Metlakatla fishing reserve as it saw fit. The decision of the federal authorities was to have the fishing within the reserve regulated under a uniform system of regulation—not to grant the Metlakatlans any rights to fish in a particular *manner* and at a particular time. It would be in complete disregard of this clearly established congressional policy to hold that in Sec. 4 of the Statehood Act, Congress meant to relegate Metlakatla to the status of an aboriginal Indian reservation. If rights were preserved by that section, the only right, consistent with congressional policy, can be that of refusing entrance to nonresidents of the community. But the Metlakatlans' fishing is subject to state law, and that law forbids the use of traps.

B. THE STATE'S REGULATION OF FISHING WITHIN THE METLAKATLA RESERVE DOES NOT CONFLICT WITH THE SUPREMACY CLAUSE

(1) State regulation of fishing in the Metlakatla reserve has not been preempted by federal legislation

Appellant urges this Court to hold that state regulation of fishing on the Metlakatlan reserve is void under the doctrine of preemption (MEBR 34). In support of this contention, Metlakatla suggests that an irreconcilable conflict has arisen between two sovereigns—the State forbidding traps, and the Secretary permitting them. As a result of this "conflict," state power must yield to federal authority.

The fallacy in this argument is that the will of the Secretary does not constitute the will of the Govern-

ment. The Secretary has not based the regulations on his own desires, but on what he believes to be the will of Congress as expressed in Sec. 4 of the Statehood Act. If Sec. 4, as suggested by appellees, did not reserve jurisdiction over the entire fishing process of the Metlakatlans to the Federal Government, but instead only reserved jurisdiction to keep the water area exclusive, it follows that the Secretary's interpretation is invalid and no question of preemption arises. There must be a clear and unequivocal expression of congressional will by Congress if state powers are to be preempted. *Cohens* v. *Virginia*, 6 Wheat 264, 443; *Reid* v. *Colorado*, 187 U.S. 137, 148 (1902). Here, there is no expression of congressional will which in any way conflicts with state law. In the absence of a clear conflict, state law must prevail.

(2) State regulation in the Metlakatla reserve does not constitute interference with a federal instrumentality

As a corollary to its argument of federal preemption, Metlakatla claims complete immunity from state fishing regulations on the grounds that such regulations constitute interference with a federal instrumentality. In support of its claim of broad immunity, appellant cites *Alaska* v. *Annette Island Packing Co.*, 289 Fed. 671 (9th Cir. 1923), holding that Territorial occupation taxes could not be imposed upon a private cannery operating within the confines of the reserve (MEBR 35). The case never reached this court, and its holding appears to have been expressly repudiated in *Oklahoma Tax Comm'n* v. *Texas Co.*, 436 U.S. 342 (1949).

Appellees do not question the principle that a state is forbidden to interfere with the operation of a fed-

eral instrumentality. However, the immunity extends only so far as is necessary to protect the federal function. *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938); *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937). Assuming that the federal purpose in establishing the Metlakatla reserve was to aid the Metlakatlans in becoming self-sufficient, the Government selected a particular means to accomplish this result. It set aside for the community a section of Alaskan waters in which they alone could fish—a valuable contribution to the economy of the community. However, the Government did not go so far as to free the Metlakatlans from fishing regulations applicable to all of Alaska. The Metlakatlan economy has always been subject to "interference" from fishing restriction, under the obvious theory that regulation for conservation is not interference at all, but is directed at improving the economy in the long run. When the Alaskan fishing season was closed, Metlakatla was similarly forbidden to fish. When the number of fish traps in the State were curtailed, Metlakatla's traps were similarly reduced. It is difficult to understand how state regulation of fishing within the water reservation interfers with federal policy, if it has always *been* federal policy to regulate the reserve under general fisheries regulations. Regulation of the means of fishing is entirely consistent with the growth and development of the federal instrumentality, much as it is consistent with the development with the entire fishing effort in the State.

The real basis of Metlakatla's argument of interference with a federal instrumentality seems to be that if fish traps are abolished, the community will be faced with an economic adjustment due to the

decreased number of fish available for their cannery. The Alaska Supreme Court both challenged the Metlakatlan claim and minimized its impact:

> "Appellants have pointed out that sizeable balances remain unpaid on government loans which financed the purchase of traps, canneries, boats and related gear. They also argue that the loss of trap fishing privileges will seriously affect their economy. It appears from the record that there is a sufficient number of independent seine boats in Southeastern Alaska to supply appellants' canneries. If not, the vacuum will undoubtedly be filled within a very short time. We are not convinced that the over-all economy of appellant communities will suffer. On the contrary, there is every reason to believe that the economy of the individual fisherman will be improved. Financial adjustments on loan repayments may be necessary. Adjustment has already taken place in the salmon industry generally. Private enterprise has been required to make radical financial and physical adjustments patterned as nearly as possible to the state's flexible plan for the conservation and rebuilding of the salmon resource." (Op., 62-63.)

While federal policy may strive to place native wards on a substantially equal basis with their fellow citizens, federal policy has never sought to create super-citizens out of natives. All Alaskans, native and white, have had to adjust to the fact that the future needs of the State require that the present drain on the salmon resource be curtailed. It would be a distortion of the aims of federal native policy, particularly in Alaska, for one community of natives to be free to reap the benefits of the deprivation of all other citizens. Metlakatla, as an Alaskan community, must share the

duties as well as the benefits of state law. Temporary inconveniences must be subordinated to a policy dedicated to preventing exploitation to annihilation of Alaska's greatest resource.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments below should be affirmed.

Respectfully submitted,

RALPH E. MOODY
Attorney General of Alaska

AVRUM M. GROSS
Assistant Attorney General

Attorneys for Appellees

APPENDIX A

Statutes Involved

1. ALASKA STATEHOOD ACT, Sec. 1, 72 Stat. 339:

"[Sec. 1. *Declaration; acceptance, ratification and confirmation of Constitution*] Subject to the provisions of this Act, . . . the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, . . ."

2. ALASKA STATEHOOD ACT, Sec. 4, 72 Stat. 339:

"As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided,* That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be con-

strued as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further,* That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation."

3. ALASKA STATEHOOD ACT, Sec. 6(e), 72 Stat. 340-341:

"(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided,* That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days ofter the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and

conservation of said resources in the broad national interest . . ."

4. ALASKA OMNIBUS ACT, Sec. 2, 73 Stat. 141:

"(a) Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words 'all such lands or other property, belonging to the United States or which may belong to said natives', and inserting in lieu thereof the words 'all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives'.

"(b) Section 6(e) of said Act is amended by striking out the word 'legislative' and inserting in lieu thereof the word 'calendar'."

5. WHITE ACT, Sec. 1, 43 Stat. 464, amended 44 Stat. 752, 48 U.S.C., sec. 221:

"Section 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited

therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. . . ."

6. TREATY OF CESSION, Art. VI, 15 Stat. 539:

"In consideration of the cession aforesaid the United States agree to pay at the treasury in Washington, within ten months after the exchange of the ratifications of this convention, to the diplomatic representative or other agent of his Majesty the Emperor of all the Russias, duly authorized to receive the same, seven million two hundred thousand dollars in gold. The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto."

7. PRESIDENTIAL PROCLAMATION No. 1332, April 28, 1916, 39 Stat. 1777:

"• • •

"WHEREAS the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

"WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,

"NOW, therefore, I, WOODROW WILSON, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

"Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

8. Act of May 7, 1934, Sec. 3(c), 48 Stat. 667:

"The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakatla Colony. And any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to the modification, alteration, or repeal by the Congress or the President, respectively."

9. Session Laws of Alaska 1959, Ch. 17, Sec. 1, as amended by Session Laws of Alaska 1959, Ch. 95:

"Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska."

10. Session Laws of Alaska 1959, Ch. 95, Sec. 1:

"Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers

of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives."

11. C.F.R., Tit. 25, Ch. 1(H), Part 88.2 (Supp. 1961):

"§ 88.2 *Restrictions on Indian fish traps.*

"(a) Subject to the limitations of paragraph (c) of this section, not more than twenty-one salmon fish traps may be, but are not required to be, utilized for the purpose of salmon trap fishing by Indian villages. Such fish trap operations, if the natives elect to engage in them, shall be conducted as heretofore only at sites hereinafter described, and within the fishing districts and fishing sections defined in the 1960 edition of the Regulations of the Alaska Board of Fish and Game for Commercial Fishing in Alaska.

"(b) Angoon Community Association: Salmon trap fishing is permitted, but not required, at the following sites within the southern section of the western district when any salmon purse seine fishing is permitted by the State of Alaska in the southern section of the western district:

"(1) Chicago Island at 57°36'16" north latitude, 134°51'34" west longitude.

"(2) Admiralty Island at 57°22'28" north latitude, 134°34'18" west longitude.

"(3) Killisnoo Island at 57°28′15″ north latitude, 134°36′35″ west longitude.

"(4) Admiralty Island at 57°13′52″ north latitude, 134°39′05″ west longitude.

"(c) Organized Village of Kake: Salmon trap fishing is permitted but not required, at the following sites within the General Section of the eastern district when any salmon purse seine fishing is permitted by the State of Alaska in the General Section of the eastern district:

"(1) Stephens Passage at 57°21′20″ north latitude, 133°27′02″ west longitude.

"(2) Frederick Sound at 57°11′27″ north latitude, 133°34′02″ west longitude.

"(3) Frederick Sound at 57°10′52″ north latitude, 133°32′44″ west longitude.

"(4) Admiralty Island at 57°18′40″ north latitude, 133°57′21″ west longitude.

"(5) Admiralty Island at 57°10′29″ north latitude, 134°12′53″ west longitude.

"(6) Herring Bay at 57°07′21″ north latitude, 134°19′45″ west longitude.

"(7) Admiralty Island at 57°04′02″ north latitude, 134°25′20″ west longitude.

"(8) Kupreanof Island at 57°01′23″ north latitude, 134°02′50″ west longitude.

"(9) Kuiu Island at 56°55′52″ north latitude, 134°16′08″ west longitude.

"(d) Metlakatla Indian Community (Annette Island Fishery Reserve): Salmon trap fishing is permitted, but not required, at the following sites within the southeast section of the Clarence Strait District

from the opening date set by the State of Alaska for any salmon purse seine fishing in the General Section of the southern district to the closing date set by the State for any salmon purse seine fishing in the southeast section of the Clarence Strait District, or one week following the closing date set by the State for any salmon purse seine fishing in the General Section of the southern district, whichever date is later:

"(1) Annette Island at 55°15'09" north latitude, 131°36'00" west longitude.

"(2) Annette Island at 55°12'52" north latitude, 131°36'10" west longitude.

"(3) Annette Island at 55°02'47" north latitude, 131°38'53" west longitude.

"(4) Annette Island at 55°05'41" north latitude, 131°36'39" west longitude.

"(5) Annette Island at 55°01'54" north latitude, 131°38'36" west longitude.

"(6) Annette Island at 55°00'45" north latitude, 131°38'30" west longitude.

"(7) Annette Island at 54°59'41" north latitude, 131°36'48" west longitude.

"(8) Ham Island at 55°10'13" north latitude, 131°19'31" west longitude.

"(e) During the 1960 fishing season and until the Secretary or his authorized representative determines otherwise, and if the villages elect to operate any fish traps, the villages may operate traps only at the following sites: Angoon: (1), (2), and (4); Kake: (3), (4), (8), and (9); Metlakatla: (2), (3), (4), and (6)."

APPENDIX B

DEPARTMENT OF REVENUE
STATE OF ALASKA
JUNEAU

November 27, 1961

The Honorable Ralph Moody
Attorney General
P. O. Box 2170
Juneau, Alaska

Attention Avrum Gross
Assistant Attorney General

Dear Mr. Moody:

Re Metlakatla Community Taxes

In reply to your inquiry regarding the liabilities of the citizens of the Metlakatla Community for State taxes, the Department of Revenue treats them the same as any other individual citizen in Alaska. They are subject to the individual income tax, school tax and inheritance tax. If they are engaged in business, even though the place of business is located within the Metlakatla Community limits, they are liable for business license and gross receipts tax. If they have coin operated devices in their place of business, they become liable for the amusement and/or gaming device tax. They are required to purchase motor vehicle licenses and motor vehicle drivers licenses and to pay motor fuel tax like any other citizen.

Historically, they have been treated like all other citizens in Alaska and are subject to all State tax laws without any exceptions.

Sincerely yours,

/s/ Peter Gatz
Peter Gatz
Commissioner

APPENDIX C

STATE DEPRESSED AREA FUNDS ALLOCATED TO APPELLANTS

To: Governor William A. Egan

From: Robert E. Hoffman
Director of Rural Development

Subject: Governor's Work Projects
for Depressed Areas

November 16, 1960

Community	($50,000) 1958-59	($200,000) 1959-60	($155,000) 1960-61
Angoon	$ 8,000	$10,000	$ 8,000
Craig	8,075	10,000	8,000
Hydaburg	8,050		10,000
Hoonah	8,000	10,000	
Klawock	8,075	10,000	8,000
Kake	8,000	10,000	8,000
Yakutat	2,300		3,500
Haines		10,000	
Klukwan		5,000	
Saxman		8,000	4,000
Wales		3,000	
Wainwright			3,000
Kotzebue		7,500	
Elim		3,000	
Kaltag		3,000	
Koyuk		3,000	
Teller		3,000	
Cordova		10,000	
Valdez		10,000	
Kodiak		10,000	
Tyonek		6,000	
Teller Mission		3,000	
White Mountain		3,000	
Holy Cross		3,000	
Unalaska		2,500	
Fort Yukon		3,000	
Fortuna Ledge		2,500	
Nightmute		2,500	

Community	($50,000) 1958-59	($200,000) 1959-60	($155,000) 1960-61
Chefornak		2,500	
Kipnuk		2,500	
Eek		2,500	
Bethel		7,500	
Unalakleet		7,500	
Eagle		3,000	
Hooper Bay		5,000	
Shaktoolik			
Metlakatla			2,000
Wrangell			8,000
			6,000

APPENDIX D

SOUTHEASTERN ALASKA CATCH BY GEAR
1951-1961 in Number of Fish

CATCH SUMMARY

All Gear	# of Units	Kings	Reds	Cohos	Pinks	Chums
1951		474,550	819,621	3,310,226	22,220,113	4,123,010
1952		528,407	919,316	1,743,753	9,802,657	4,178,549
1953		498,345	1,376,454	1,163,581	4,981,409	3,541,901
1954		397,620	1,220,157	1,770,807	8,909,481	4,243,671
1955		373,552	747,330	1,338,477	9,333,972	1,528,202
1956		239,148	920,778	916,542	13,728,271	2,701,261
1957		300,046	1,071,257	1,218,479	6,857,895	3,413,051
1958		325,154	1,009,235	955,349	9,837,907	2,787,025
1959		364,740	890,638	1,024,390	7,851,298	1,291,409
1960		309,989	588,288	720,808	2,985,021	1,019,152
*1961		228,262	744,537	884,455	12,635,909	2,558,451

CATCH BY GEAR

Trap	# of Units	Kings	Reds	Cohos	Pinks	Chums
1951	252	1,029	278,359	821,696	14,794,634	1,622,396
1952	265	583	297,304	344,941	5,316,827	1,329,138
1953	256	1,960	563,666	268,321	2,621,746	907,072
1954	118	1,450	325,017	193,735	4,619,918	781,069
1955	113	1,344	198,725	166,991	4,080,050	343,344
1956	122	5,775	295,773	148,941	6,153,690	571,276
1957	123	2,363	310,952	132,938	2,179,618	620,98[illegible]
1958	146	2,204	394,954	170,098	5,343,907	800,506
1959	11	17	18,460	7,887	384,404	17,576
1960	11	48	13,146	3,723	156,442	14,415
*1961	11	27	18,906	9,373	951,750	42,420
Purse Seine						
1951	462	1,751	144,498	228,450	7,061,833	2,423,416
1952	549	1,625	277,512	125,477	4,335,543	2,695,388
1953	457	4,921	402,034	146,493	2,289,907	2,575,347
1954	389	9,449	427,668	107,923	4,010,928	3,129,072
1955	636	9,872	228,377	91,346	5,087,740	997,981
1956	437	4,701	348,784	124,825	7,422,036	1,930,352
1957	450	3,975	456,155	124,611	4,592,725	2,107,892
1958	505	5,330	337,996	112,575	4,213,872	1,604,947
1959	482	4,549	542,140	185,046	7,208,811	891,609
1960	512	6,799	378,740	133,096	2,726,298	777,681
*1961	500	5,791	433,045	257,115	11,236,754	2,212,446
Beach Seine						
1951	23		100	3,627	32,004	4,868
1952	31		153	2,708	9,894	14,869
1953	29		1,267	1,840	3,331	35,757
1954	35		374	2,113	23,360	32,257
1955	34	2	204	1,145	11,255	7,311
1956	18		56	880	10,598	7,985
1957	10		1,387	577	1,140	12,431
1958	17		283	462	2,456	5,675

*All 1961 figures are preliminary.
1961 Units of gear estimated

Source: ALASKA DEPARTMENT OF FISH AND GAME

SOUTHEASTERN ALASKA CATCH BY GEAR
1951-1961 in Number of Fish

Gill Nets	# of Units	Kings	Reds	Cohos	Pinks	Chums
1951	598	20,400	394,700	254,100	163,762	48,386
1952	944	79,323	343,913	287,018	106,227	135,039
1953	1336	28,812	408,777	259,143	44,132	216,577
1954	1113	42,613	465,157	417,591	152,058	293,786
1955	1616	36,374	319,266	329,561	97,660	176,636
1956	1142	31,220	275,897	233,689	63,745	185,720
1957	785	24,375	301,279	165,644	40,026	661,829
1958	935	31,699	274,758	197,890	226,264	373,028
1959	759	41,686	329,877	264,291	202,769	380,926
1960	673	20,464	195,464	187,787	76,729	224,607
*1961	625	19,444	291,286	222,967	428,405	300,885
Troll	**Units**					
1951	1903	451,180	1,964	2,002,653	167,880	23,944
1952	1965	446,876	434	983,609	34,166	4,115
1953	1694	462,652	710	487,784	22,293	7,148
1954	1697	344,108	1,941	1,049,445	103,217	7,487
1955	1727	325,960	758	749,434	57,267	2,930
1956	1396	197,452	268	408,207	78,202	5,928
1957	1976	269,333	1,484	794,709	44,386	9,940
1958	2721	285,921	244	474,324	50,408	2,869
1959	2013	318,488	161	567,166	55,344	1,298
1960	1508	282,678	938	396,202	25,552	2,449
*1961	1500	203,000	1,300	395,000	19,000	2,700

*All 1961 figures are preliminary.
1961 Units of gear estimated

Source: Alaska Department of Fish and Game